No. 91-269

Supreme Court, U.S.
FILED
SEP 16 1991
THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

DONALD L. HELLING, *et al.*,

Petitioners,

v.

WILLIAM McKINNEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Cornish F. Hitchcock
(Counsel of record)
Alan B. Morrison

Public Citizen Litigation Group
2000 P Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 833-3000

Attorneys for Respondent

September 1991

QUESTIONS PRESENTED

1. Should this Court grant review to decide the extent to which the Eighth Amendment protects non-smoking prisoners who are subjected to massive amounts of cigarette smoke from their cellmates and others, when the court of appeals simply remanded the case for a full trial at which all of the relevant evidence will be adduced?

2. Should the Court reverse the ruling of the court of appeals, which is in accord with the two other appellate courts to consider this issue, that a trial court has the discretion to appoint an expert witness under Rule 706 of the Federal Rules of Evidence when the compensation paid to that witness would be borne by one party only?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 5

CONCLUSION 12

TABLE OF AUTHORITIES

Cases: **Page:**

Avery v. Powell, 695 F. Supp. 632 (D.N.H. 1988) 7

Beeson v. Johnson, 668 F. Supp. 498 (E.D.N.C. 1987) 7

Caldwell v. Quinlan, 729 F. Supp. 4 (D.D.C.), *aff'd mem.*, 923 F.2d 200 (D.C. Cir. 1990), *pet. for cert. pending*, No. 90-7616 8

Clemmons v. Bohannon, 918 F.2d 858 (10th Cir. 1990) 7

Estelle v. Gamble, 429 U.S. 29 (1976) 10

Franklin v. State of Oregon, 662 F.2d 1337 (9th Cir. 1981) 7

Gorman v. Moody, 710 F. Supp. 1256 (N.D. Ind. 1989) 8

Johnson v. Moore, 926 F.2d 921 (9th Cir. 1991) 7

Kensell v. State of Oklahoma, 716 F.2d 1350 (10th Cir. 1981) 7

Lee v. Carlson, 645 F. Supp. 1430 (S.D.N.Y. 1986) 8

Steading v. Thompson, No. 90-2588 (7th Cir. 19 August 1991) 8-9

United States Marshals Service v. Means, 741 F.2d 1053 (8th Cir. 1984) 12

Webster v. Sowders, 846 F.2d 1032 (6th Cir. 1988) 12

West v. Wright, 747 F. Supp. 329 (E.D. Va. 1990) 6, 8

Wilson v. Lynaugh, 878 F.2d 846 (5th Cir. 1989) 7

Wilson v. Seiter, 111 S. Ct. 2321 (1991) 8-9, 10-12

Statutes and Regulations:

28 C.F.R. §§ 551.160-551.163 6

42 U.S.C. § 1983 2

Rules:

Federal Rules of Evidence Rule 706 ..... 3, 4-5, 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-269

DONALD L. HELLING, *et al.*,

Petitioners,

v.

WILLIAM McKINNEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent William McKinney respectfully asks the Court to deny the petition for a writ of certiorari for the reasons stated below.

STATEMENT OF THE CASE

McKinney, a Nevada state prisoner, filed this action *pro se* in the United States District Court for the District of

Nevada in 1987. His complaint, brought under 42 U.S.C. § 1983, sought damages and injunctive relief based on his involuntary exposure to secondary cigarette smoke or environmental tobacco smoke ("ETS") in the Nevada State Prison in Carson City. Named as defendants were the warden and other Carson City prison officials. Some of them no longer hold those offices, but for convenience we refer to the original defendants and/or their successors as petitioners.

McKinney complained that he was a non-smoker who was forced to share a cell with a prisoner who smoked five packs of cigarettes a day and that prison officials refused to move him to a single cell or to house him with a non-smoking cellmate despite his repeated complaints that forced inhalation of smoke was damaging his health. He also objected to the fact that smoking is allowed in the prison library, as it is everywhere in the prison, except the infirmary and the culinary. The record indicates that two-thirds of the prisoners at Carson City prison smoke (Pet. App. A-19-A-20).

The case was tried to a jury before a magistrate who viewed the complaint as stating two Eighth Amendment claims: (1) deliberate indifference to McKinney's existing medical problems, such as nosebleeds, sore throats and similar cold symptoms, and (2) a constitutional right to be housed in a smoke-free environment (Pet. App. B-2-B-3, B-7). The magistrate directed a verdict in favor of petitioners after hearing McKinney and other inmates testify on his behalf.

The magistrate concluded that McKinney's second claim lacked merit because, as a matter of law, he had no right to be free from cigarette smoke while serving in state prison. As to the first claim, she acknowledged that the Eighth Amendment bars petitioners from being deliberately indifferent to McKinney's needs, but found that McKinney's testimony failed to show any serious existing medical need which was not receiving medical care. She noted the absence of any expert or medical testimony showing that petitioners had proximately caused any present injuries and a lack of proof

that exposure to ETS could cause various symptoms of which McKinney complained (Pet. App. B-7-B-10).

In reaching this result, however, the magistrate excluded all evidence except that relating to McKinney's current medical symptoms, including documents on the potential future health effects of exposure to ETS (Pet. App. A-4). She also denied McKinney's motion under Rule 706, Fed. R. Ev., to appoint an expert who could testify on scientific issues regarding exposure to ETS, believing that the Rule did not give her the discretion to appoint such an expert if the cost of his testimony would be borne by one side only (Pet. App. F-3, A-37).

The court of appeals unanimously reversed on the Eighth Amendment issue raised by the petition. The court held that the magistrate erred in framing that issue in "all-or-nothing terms," as that approach "excluded a valid eighth amendment claim lying between these two extremes: that compelled exposure to levels of ETS that pose an unreasonable risk of harm to human health constitutes cruel and unusual punishment" (Pet. App. A-5). Thus, the court ruled that a "reasonable factfinder could conclude that the adverse health effects associated with ETS exposure would be especially severe for McKinney" (Pet. App. A-20).

In holding that the Eighth Amendment may be violated if prisoners are exposed to an "unreasonable" risk to their health, the court of appeals cited scientific evidence, including a 1986 Surgeon General's report which stated that "a clear judgment can now be made: exposure to ETS is a cause of lung cancer. The data presented in this Report establish that a substantial number of the lung cancer deaths that occur among nonsmokers can be attributed to involuntary smoking" (Pet. App. A-17). The report added that the scientific case against involuntary smoking as a health risk "is more than sufficient to justify appropriate remedial action, and the goal of any remedial action must be to protect the nonsmoker from environmental tobacco smoke" (Pet. App. A-18). The court also cited a 1990 draft report by the Environmental

Protection Agency which estimated that some 3800 deaths each year among nonsmokers in the United States could be attributed to ETS, which EPA classifies as a Group A (known human) carcinogen, along with such substances as arsenic, asbestos, benzene, chromium compounds and vinyl chloride (Pet. App. A-18-A-19).

In assessing the evolving standards of decency in this area, the court of appeals noted widespread bans on smoking in public places and confined areas, adding that: (1) The federal prison system had moved to protect non-smokers; (2) The American Jailers Association, representing 6500 jail administrators, has backed a ban on smoking in prisons; and (3) As of May 1990, county and state corrections departments in 13 states had either banned or were considering a ban on cigarette smoking (Pet. App. A-27-A-29).

These factors led the court of appeals to conclude that McKinney had stated a claim for injunctive relief and that he "should be allowed to present evidence regarding the level and degree of his exposure to ETS and whether that degree of exposure is sufficient to create an unreasonable risk of harm to his health" (Pet. App. A-30). Citing the lack of evidence upon which it could draw any conclusions about which conditions would cause such an unreasonable risk of harm to McKinney's health, the court remanded the case to district court for a full trial on these issues (Pet. App. A-47 n.29).[1]

The court of appeals also held that the magistrate's refusal to appoint an expert rested on too narrow a reading of Rule 706, Fed. R. Ev., and that she should, on remand, "consider appointing an expert witness or witnesses who can provide the court with scientific information on the health

---

[1] The court added that the trial court should consider appointing counsel to represent McKinney on remand (Pet. App. A-30). In fact, a Nevada attorney has agreed to represent him in further proceedings in the district court.

effects of ETS and on the concentration levels of ETS in the Carson City prison" (Pet. App. A-38-A-39). However, the court ruled that McKinney could not pursue a damages claim inasmuch as petitioners enjoy qualified immunity for their actions (Pet. App. A-31). The court also upheld the magistrate's entry of a directed verdict as to McKinney's other Eighth Amendment claim involving his existing medical symptoms (Pet. App. A-39-A-40), held that a Nevada anti-smoking law applies to state prison libraries (Pet. App. A-32-A-35), and held that the magistrate had not erred in denying McKinney's request for production of a trial transcript at the state's expense (Pet. App. A-40-A-42).

Petitioners sought rehearing by the panel and suggested the need for rehearing *in banc*. On 14 May 1991 the panel denied the petition, noting that the suggestion for *in banc* review had been rejected with no judge requesting a vote on the suggestion.

REASONS FOR DENYING THE WRIT

1. This case comes before the Court on the basis of a decision which holds only that McKinney has stated a claim for relief under the Eighth Amendment if he can show that prison officials have housed him "in a prison environment that exposes him to levels of ETS that pose an unreasonable risk of harming his health" (Pet. App. A-42). The court of appeals did not specify what conditions would pose such an unreasonable risk, much less suggest what remedy would be needed if such a risk were found, leaving those questions to be addressed in the first instance by the district court, on the basis of all the evidence presented.

Thus, petitioners are wide of the mark when they argue (at 7) that review should be granted because this case is "of national significance which could have a far-reaching impact" on prison management. At this point in the case, and on this record, it is not clear what impact the court of appeals'

ruling will have, either in Nevada or elsewhere. Moreover, the claim that the ruling below will inevitably lead to costly and burdensome changes in the way that prisons are managed is undercut by the fact that the federal prison system, as well as some state prison systems, have taken steps to separate non-smoking prisoners from cigarette smokers. *See* 28 C.F.R. §§ 551.160-551.163 (federal prison officials must designate smoking and non-smoking areas and, "[t]o the extent practicable," place non-smoking inmates in non-smoking quarters; double celling of smoker and non-smoker to be "avoided except where impractical due to circumstances, and then may be done only for limited duration"); *see also West v. Wright*, 747 F. Supp. 329, 332 (E.D. Va. 1990)(describing steps to protect non-smokers in state prison system).

There is another reason why review should be denied at this time: Around the time that the Ninth Circuit issued its decision, McKinney was moved from the Carson City prison to Ely State Prison. Thus, the record contains no facts regarding the conditions of his confinement at Ely insofar as they relate to his exposure to cigarette smoke, nor is there any indication whether this transfer is only temporary or whether he may be transferred back to Carson City. Moreover, of the current petitioners, all but the Attorney General appear to have responsibilities only at Carson City, not the Ely facility. In light of this development and the absence of record evidence on key facts, the best course at this time would be to deny review and allow the district court to sort things out on remand from the court of appeals.

Thus, it would be premature for this Court to grant review when the case is far from over, the record is incomplete, McKinney's current situation is unclear, and the implications of the ruling below are theoretical at best.

2. Contrary to petitioners' assertions (at 11-20), the other appellate and trial court opinions are in harmony with the decision below to the extent that they have considered the Eighth Amendment issue posed here.

At the outset, petitioners err in claiming that the Ninth Circuit issued two conflicting opinions in the same month. *Johnson v. Moore*, 926 F.2d 921 (1991), which is said to conflict with the ruling here, is readily distinguishable because the authorities there responded to the prisoner's complaint of being double celled with a heavy smoker by moving him to another cell. Here, by contrast, McKinney is complaining that prison authorities did *not* respond to his objection about being celled with a prisoner who smoked five packs of cigarettes a day. Moreover, petitioners cited the alleged conflict with *Johnson* in their suggestion for rehearing *in banc*, but no Ninth Circuit judge asked for a vote on that suggestion. *See also Franklin v. State of Oregon*, 662 F.2d 1337, 1346-47 (9th Cir. 1981)(Eighth Amendment violation may be found if inmate suffering from throat cancer housed with cigarette smoker).

Nor does the decision here conflict with decisions in other circuits. Indeed, a panel of the Tenth Circuit reached the same conclusion in *Clemmons v. Bohannon*, 918 F.2d 858 (1990), although the opinion was vacated when that court voted to rehear the case *in banc*. *Id.* at 873 (argued February 1991). The other Tenth Circuit case petitioners cite, *Kensell v. State of Oklahoma*, 716 F.2d 1350 (1981), did not involve the Eighth Amendment. *Wilson v. Lynaugh*, 878 F.2d 846 (5th Cir. 1989), is also distinguishable because it involved a prisoner's effort to relitigate his 1980 defeat in a case challenging exposure to secondary cigarette smoke, and the focus of the opinion was on the res judicata issue.

Nor do the district court decisions cited by petitioners bolster the case for review. Some hold that an Eighth Amendment claim may be stated in some situations, *Beeson v. Johnson*, 668 F. Supp. 498 (E.D.N.C. 1987); *Avery v. Powell*, 695 F. Supp. 632 (D.N.H. 1988), while those reaching an opposite conclusion were properly distinguished by the court of appeals (Pet. App. A-44 n.3) on the ground that the complaints there asserted a more sweeping right to an utterly

smoke-free environment. *Gorman v. Moody*, 710 F. Supp. 1256 (N.D. Ind. 1989); *Caldwell v. Quinlan*, 729 F. Supp. 4 (D.D.C.), *aff'd mem.*, 923 F.2d 200 (D.C. Cir. 1990), *pet. for cert. pending*, No. 90-7616. Another case was dismissed based on pleading deficiencies, *Lee v. Carlson*, 645 F. Supp. 1430 (S.D.N.Y. 1986), while in *West v. Wright*, *supra*, the court was "not called upon to determine whether the indefinite confinement of a nonsmoking prisoner against their will in a cell with a smoker implicates the Eighth Amendment" because it was "undisputed" that the prison authorities had "implemented significant safeguards for the protection of nonsmokers, including the opportunity to be assigned to a nonsmoking cell with a fan, output and input vents, and a window that may be opened." 747 F. Supp. at 332.

The recent decision in *Steading v. Thompson*, No. 90-2588 (7th Cir. 19 August 1991), also has no effect here. *Steading* is factually distinguishable because the prisoner there seemed to be seeking a smoke-free prison environment in the same manner as the prisoners in *Gorman* and *Caldwell*. Nor did he state a focused claim of the sort McKinney is making here, namely, that he was housed with a cellmate who smoked five packs of cigarettes a day and that prison officials refused to move him despite specific requests to do so.

Moreover, *Steading* appears to read the court of appeals' opinion in this case as depending on the proposition that "prison conditions may violate the eighth amendment even though the prisoner cannot establish that anyone devised those conditions (or permitted them to persist) in order to inflict punishment" (slip op. at 4). That proposition is said to conflict with *Wilson v. Seiter*, 111 S. Ct. 2321 (1991), which clarified the culpable mental state that must be proven in order to establish an Eighth Amendment violation. As part 4 will discuss in more detail, however, there is no conflict between *Wilson* and the court of appeals' decision here because the district court will have to assess whatever evidence is submitted on remand in light of *Wilson*. And even if

one were to assume, as does *Steading*, that a policy decision to allow smoking within a prison does not violate the Eighth Amendment, it does not follow, as a matter of law and without hearing evidence, that prison officials enjoy absolute freedom when, as here, a prisoner makes specific complaints about specific treatment which prison officials have refused to address.

3. Petitioners next argue (at 20-22) that this Court should grant review because Nevada enacted a law five months *after* the court of appeals' decision which indicates that facilities used to house or serve inmates are not subject to Nevada's law against smoking in public places. Without conceding the point, this change may have an effect on his statutory claim for injunctive relief with regard to the prison library (Pet. App. A-35), a point better left to full briefing in the district court. It does not, however, undermine the court of appeals' Eighth Amendment analysis, which is supported by the overwhelming thrust of legislation in the opposite direction, even in the context of prisoners and prison conditions (Pet. App. A-21-A-30). *See* pp. 3-4, *infra*.

Nor is review warranted on the theory that the court of appeals allegedly considered arguments not raised by the parties. Pet. at 23-26. The issue on appeal, as framed by McKinney, a *pro se* litigant in both lower courts, was whether the magistrate erred in directing a verdict in favor of petitioners. That issue reasonably embraces the question whether McKinney had stated an Eighth Amendment claim, including whether the magistrate was correct in viewing this issue in all-or-nothing terms.

Petitioners also claim (at 26) that the court of appeals unfairly deprived them of an opportunity to submit detailed briefs before it held that an Eighth Amendment claim may exist between the two extremes identified by the magistrate, claiming that they would have produced "evidence" on the difficulties they perceive in "classifying and housing inmates within the limitations of budget, facilities, and securities

concerns." But appellate courts do not sit to receive evidence, and if anything, this claim argues against granting review. The court of appeals reversed a verdict that was directed in petitioners' favor at the close of McKinney's case. That ruling means that petitioners will, in fact, have an opportunity to introduce evidence on all factual issues that they deem relevant in the district court, which is best suited to receive such evidence and weigh it in the first instance.

4. Nor should the Court vacate the judgment below and remand for further consideration in light of *Wilson v. Seiter*, *supra*, which held that an inmate making an Eighth Amendment challenge to prison conditions must show that prison officials acted with "deliberate indifference," the standard set out in *Estelle v. Gamble*, 429 U.S. 29 (1976), for suits alleging a failure to provide adequate medical care. Pet. at 26-30. *Wilson* provides no basis to grant review or even remand this case because the Court in *Wilson* appeared to assume that the conditions being challenged could violate the Eighth Amendment, and the debate focused on whether prison officials had the requisite state of mind to establish that a violation had, in fact, occurred and exactly what that state of mind had to be. Here, the issue was precisely the opposite and focused on whether a prisoner who was an involuntary smoker could *ever* state an Eighth Amendment claim. And, of course, now that *Wilson* is the law, McKinney will have to prove "deliberate indifference" by the petitioners in order to prevail at trial.

Petitioners nonetheless argue that the "subjective" element in *Wilson* is not met here because McKinney failed to show that petitioners acted with the requisite intent to violate his Eighth Amendment rights. They cite that portion of the magistrate's opinion which dismissed McKinney's claim of inadequate medical care (*see* Pet. at 27-28; Pet. App. B-7-B-10), but that discussion is not germane here because it involves his *other* claim, which focused on petitioners' response to McKinney's current cold-like symptoms. No evidence was

heard on his claim involving prison conditions (which is the subject of this petition) because the magistrate held, as a matter of law, that McKinney had failed to state a claim for relief, which ruling was overturned on appeal.

Questions about whether prison officials were deliberately indifferent to McKinney's present symptoms are distinct from questions about the health hazards which may be associated with any prison conditions which are found, as a factual matter and consistent with *Wilson*, to present an unreasonable risk to McKinney's health. Given the dearth of evidence on the latter claim, there is nothing in *Wilson* for the court of appeals to reconsider if the case were remanded for that purpose, and the proper remedy would still be remanding the case to the district court for fact finding.

Petitioners also contend (at 28-30) that the decision below violates an "objective" component of *Wilson* insofar as *Wilson* restated prior holdings of this Court as to what constitutes an Eighth Amendment violation. This argument merely restates petitioners' disagreement with the court of appeals' opinion and provides no basis for the Court to remand for further consideration.

Petitioners add (at 30) that McKinney made no showing that "his health or safety had been seriously threatened by exposure to secondary tobacco smoke," conveniently ignoring the fact that the magistrate did not hear evidence on that issue. They also object that the court of appeals acted "with undue haste in ruling for McKinney when [petitioners] had not even presented their own evidence to contest McKinney's legally insufficient facts." *Id.* But this proves our point. The court of appeals merely held that McKinney stated a claim which he and petitioners should litigate in the district court. Petitioners will have an ample opportunity to present evidence in that court, and no useful purpose would be served by directing the court of appeals to reconsider its holding in light of *Wilson*, when that issue will be fully considered by the district court in the first instance.

5. Nor is there any reason to review the second issue raised by this petition, *i.e.*, the court of appeals' interpretation of Rule 706, Federal Rules of Evidence. That Rule reads, in pertinent part, that compensation of experts appointed under that Rule "shall be paid by the parties in such proportion . . . as the court directs." On its face, the Rule contemplates that a trial court may allocate the costs entirely to one party or the other, the very result that petitioners complain of here. Apart from this lack of statutory basis for their rigid reading of the Rules, the only cases that petitioners cite (at 36-37) are consistent with the court of appeals' ruling here: Both apportioned costs in a way which recognized that one of the litigants was indigent. *Webster v. Sowders*, 846 F.2d 1032 (6th Cir. 1988); *United States Marshals Service v. Means*, 741 F.2d 1053 (8th Cir. 1984). Given the correctness of the ruling below, the absence of any conflict, and the lack of any suggestion that this is a serious problem requiring the Court's attention, the second question plainly does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Cornish F. Hitchcock
(Counsel of record)
Alan B. Morrison

Public Citizen Litigation Group
2000 P Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 833-3000
Attorneys for Respondent

September 1991